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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-380

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR,
Petitioner

v.

CHARLESTONE STONE PRODUCTS CO., INC.,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR THE RESPONDENT

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INDEX

Page

OPINIONS BELOW 1

JURISDICTION 2

QUESTION PRESENTED 2

STATUTES INVOLVED 2

STATEMENT 3

SUMMARY OF ARGUMENT 3

ARGUMENT

I. THE BROAD LANGUAGE OF SECTION 1 OF THE MINING ACT OF 1872 INCLUDES WATER AS A LOCATABLE MINERAL 7

II. NEITHER THE MINING ACTS OF 1866 AND 1870, NOR THE DESERT LAND ACT OF 1877 RELINQUISHED CONTROL OF FEDERALLY OWNED WATERS BY VIRTUE OF RECOGNIZING VESTED RIGHTS UNDER STATE LAW 14

III. ACTIONS BY THE UNITED STATES GOVERNMENT AND DECISIONS OF THIS COURT HAVE LIMITED THE STATES' CONTROL OF WATER WHICH PETITIONER CLAIMS IS ABSOLUTE 21

IV. DEPARTMENT OF INTERIOR CONSTRUCTION OF THE MINING LAW OF 1872 IS NOT BINDING ON THIS COURT 28

V. PETITIONER'S ASSERTION THAT LOCATING WATER UNDER THE MINING LAW MAY LEAD TO ABUSE IS MERE CONJECTURE AND IN ANY EVENT PROPERLY A CONCERN OF CONGRESS AND NOT THIS COURT .. 30

CONCLUSION 32

Cases: Pages

Arizona v. *California*, 373 U.S. 546 (1963) 27
Best v. *Humboldt Placer Mining Co.*, 371 U.S. 334 (1963) 10
Broder v. *Natoma Water & Mining Co.*, 101 U.S. 274 (1879) 8
California Oregon Power Co. v. *Beaver Portland Cement Co.*, 295 U.S. 142 (1935) ...4, 14, 15, 16, 19, 20, 21
Cameron v. *United States*, 252 U.S. 450 (1920) 10
Cappaert v. *United States*, 426 U.S. 128 (1976) 27
Castle v. *Womble*, 19 L.D. 455 (1894) 10
Chrisman v. *Miller*, 197 U.S. 313 (1905) 10
County of Marin v. *United States*, 356 U.S. 412 (1958) . 29
Dugan v. *Rank*, 372 U.S. 609 (1963) 25
Federal Power Commission v. *Oregon*, 349 U.S. 435 (1955) 26
First Iowa Hydro-Elec. Cooperative v. *Federal Power Commission*, 328 U.S. 152 (1946) 24, 26
Fresno v. *California*, 372 U.S. 627 (1963) 25
Hyde v. *United States*, 225 U.S. 347 (1911) 30
Ivanhoe Irrigation Dist. v. *McCracken*, 357 U.S. 275 (1958) 24, 25
Oklahoma v. *Texas*, 258 U.S. 574 (1922) 9
Pagosa Springs, 1 L.D. 573 (1882) 29
Robert L. Beery, 25 IBLA 287 (1976), *appeal pending sub nom. Steele* v. *Kleppe*, C-76-1840-WHO (N.D. Cal., filed Aug. 26, 1976) 29
Udall v. *Tallman*, 380 U.S. 1 (1965) 29
United States v. *Coleman*, 390 U.S. 599 (1968) 10, 11
United States v. *Toole*, 224 F.Supp. 440 (D. Mont. 1963) 11, 12
United States v. *Union Oil Co.*, 549 F.2d 1271 (9th Cir.), *cert. denied sub nom. Ottoboni* v. *United States*, 98 S.Ct. 418 (1977), *motion for leave to file petition for rehearing denied*, 46 U.S.L.W. 3542 (U.S. Feb. 28, 1978) 13
William A. Chessman, 2 L.D. 774 (1883) 29
Winters v. *United States*, 207 U.S. 564 (1908) 27

Statutes and Regulations:

Act of July 23, 1955, ch. 375, 69 Stat. 367 (Codified at 30 U.S.C. §§ 611-615 (1970)) 10

Pages

Act of May 10, 1872, ch. 152, 17 Stat. 91 (codified as amended in scattered sections of 30 U.S.C.) 9
Section 1, 30 U.S.C. § 22 (1970) 9
Act of July 9, 1870, ch. 235, 16 Stat. 217 14
Section 17, 30 U.S.C. § 52 (1970) 7, 22
Act of July 26, 1866, ch. 262, 14 Stat. 251 14
Section 9, 30 U.S.C. § 51 (1970) 7, 22
Boulder Canyon Projects Act, 43 U.S.C. §§ 617q, 618m (1970) 22
Desert Land Act of 1877, ch. 107, 19 Stat. 377 (current version at 43 U.S.C. §§ 321-323, 325, 327-329 (1970)) 14
Section 1, 43 U.S.C. § 321 (1970) 19, 22
Federal Power Act of 1920, § 9(b), 16 U.S.C. § 802(b) (1970) 22, 23
Mineral Leasing Acts, 30 U.S.C. §§ 181-194, 201-209, 211-214, 223-229a, 241, 251, 261-263 (1970) 10
Reclamation Act of 1902, § 8, ch. 1093, 320 Stat. 388 (codified at 43 U.S.C. §§ 372, 383 (1970)) 22, 23
Stock Raising Homestead Act of 1916, 43 U.S.C. §§ 291-301 (1970) 13
Taylor Grazing Act, § 3, 43 U.S.C. § 315b (1970) 22
43 C.F.R. § 3812.1 (1976) 12

Miscellaneous:

5 Cong. Rec. 1964 (1877) 19
58 C.J.S. *Mines & Minerals*, § 2(7) (1948) 13
F. Trelease, Federal-State Relations In Water Law, National Water Commission Legal Study No. 5 (1971) 8, 9, 19, 21, 22

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BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, pp. 1a-17a) is reported at 553 F. 2d 1209 (9th Cir. 1977). The opinion of the district court (Pet. App. C, pp. 19a-27a) is not reported. The decision of the Interior Board of Land Appeals (Pet. App. D, pp. 28a-58a) is reported at 9 IBLA 94 (1973).

JURISDICTION

The judgment of the court of appeals (Pet. App. B, p. 18a) was entered on May 12, 1977. On August 1, 1977, Mr. Justice Rehnquist extended the time for filing a petition for writ of certiorari to and including September 9, 1977, and the petition was filed on that date. The petition was granted on November 28, 1977 (A. 36A). The jurisdiction of this Court rests on 28 U.S.C. § 1254(1) (1970).

QUESTION PRESENTED

Whether water is a locatable mineral under the mining law of 1872.

STATUTES INVOLVED

Section 1 of the Act of May 10, 1872, ch. 152, 17 Stat. 91, (current version at 30 U.S.C. § 22 (1970)) provides:

> Except as otherwise provided, all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States.

Section 17 of the Act of July 9, 1870, ch. 235, 16 Stat. 218, (current version at 30 U.S.C. § 52 (1970)) provides:

> All patents granted, or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by section 51 of this title.

Section 9 of the Act of July 26, 1866, ch. 262, 14 Stat. 253, (current version at 30 U.S.C. § 51 (1970)) provides:

> Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; * * *

STATEMENT

Respondent does not fully agree with petitioner's Statement. As the differences relate solely to evidentiary matters which are not germane to the single issue of law presented, we will not burden the Court with a further statement.

SUMMARY OF ARGUMENT

1. The mining law of 1872 nowhere expressly provides that the term "mineral" should not include water. The plain language of the two water provisions in the mining law (§ 9 of the 1866 Act and § 17 of the 1870 Act) speaks only of recognizing water rights which have "vested and accrued" under state law. Petitioner infers from this language that Congress intended that in the future state water law would be the *exclusive* method of recognizing water rights. A construction more consonant with the statutory language is that although Congress desired to protect all

water rights, past or future, which have at some point vested under state law, it did not extend exclusive control of water rights to the states. Treating water as a locatable mineral under the mining law of 1872 would not make the water provisions surplusage. Those provisions continue to protect all water rights which have previously vested, *and* which in the future may vest under state law. The federal mining law could *only* be used to obtain rights to waters *not yet appropriated* under state law.

Recognition of water rights vested under state law is not inconsistent with the recognition of additional methods of acquiring water rights. Section 1 of the mining law of 1872, the section at issue in the present case, provides in broad and inclusive terms that *"all* valuable mineral deposits" may be located and mined. In all of the specific exceptions to this broad terminology, neither Congress nor this Court has ever removed water from the operation of the mining law. The court of appeals utilized petitioner's own test published in the Code of Federal Regulations and cited authorities for the proposition that water comes within the definition of the term "mineral." The court of appeals also used tests recognized by this Court to determine that water is a "valuable mineral" within the mining law.

2. The primary authority for petitioner's construction of the water provisions in the mining law is *California Oregon Power Co.* v. *Beaver Portland Cement Co.*, 295 U.S. 142 (1935). That case was not concerned with the mining laws. The Court was there ruling on conflicting claims based on the Homestead Act of 1862 and the Oregon Water Code and the Court specifically stated that its holding was based solely on its construction of a provision of the Desert

Land Act of 1877. Language in *Beaver Portland Cement* discussing the vested water rights provisions of the mining law is dicta. Even assuming that such language may be considered applicable to the single issue before this Court—the locatability of water under the mining law of 1872—it is completely consistent with respondent's position. Respondent concedes that water rights may continue to be appropriated for beneficial use under state law, and if so appropriated prior to location under the mining law of 1872 they are protected as vested and accrued rights under Section 9 of the 1866 Act and Section 17 of the 1870 Act. Only water to which rights have not vested under state law may be located as a mineral under the mining law of 1872.

3. Petitioner argues that other public land laws "followed the pattern" of the mining law in recognizing that state law exclusively controls the acquisition of water rights. This Court has not construed water provisions in other federal laws so broadly. For example, water provisions of the Federal Power Act and the Reclamation Act have been construed by this Court to limit state control of water rights in favor of federal control. This is more consistent with parallel state and federal water rights acquisition programs than petitioner's portrayal of a regime of exclusive state control of water rights. Petitioner supports and enforces the reservation doctrine which holds that when the United States Government reserves lands for a particular purpose it also impliedly reserves enough water to effectuate that purpose. Under that doctrine if a private citizen appropriates water from a source shared by the reservation subsequent to creation of the reservation, even if those appropriative

rights "vest" under state law, they may subsequently be held inferior to the needs of the reservation. Thus unquantified federally reserved water rights are forever superior to the rights of later appropriators whose water rights are quantified and "established" under state law. This is inimical to petitioner's contention that state law exclusively controls the acquisition of water rights.

4. The "long-standing" Department of Interior interpretation that water is not a locatable mineral under the mining law is not conclusive before this Court. Subsequent Interior decisions holding water not locatable under the mining law rely heavily on the earliest decisions consisting of a few conclusory sentences which neither cite authority nor discuss rationale. Even "more than a century of administrative decisions" cannot by mere weight of number or longevity develop a statutory interpretation immune to a fresh look and a more logical interpretation by this Court.

5. Petitioner argues that allowing the location of water as a mineral under the mining law will result in widespread abuse. This is mere conjecture, and ignores the safeguards built into the mining laws such as the "prudent man" test and the "marketability" test, which are designed to prevent abuse with respect to *all* minerals. Moreover, if the law as written is being abused, it is the responsibility of Congress to amend that law, as it has done in the past by removing certain minerals from the operation of the mining law.

ARGUMENT

I. THE BROAD LANGUAGE OF SECTION 1 OF THE MINING ACT OF 1872 INCLUDES WATER AS A LOCATABLE MINERAL.

Petitioner concedes, as he must, that "Congress nowhere expressly provided that the term 'mineral' in the mining law of 1872 should not be construed to include water" (Pet. Br., p. 23). Nevertheless petitioner divines a "clear" Congressional intention to exclude water from location under the 1872 Act because, he contends, Congress provided "in that statute for the *acquisition* of water rights under state law (by reaffirming Section 9 of the 1866 Act and Section 17 of the 1870 Act . . .)" *Id.* (Emphasis supplied). But the plain language of *both* Section 9 of the 1866 Act, 30 U.S.C. § 51 (1970), and Section 17 of the 1870 Act, 30 U.S.C. § 52 (1970), makes clear that it was the *recognition* of rights to the *use* of water which "*have vested* and accrued" that Congress articulated and *not* the *future* "acquisition of water rights under state law." For Section 9 of the 1866 Act speaks only of water rights which "have vested and accrued" and provides that "the possessors and owners of such vested rights shall be maintained and protected," and Section 17 of the 1870 Act speaks only of "vested and accrued water rights" or ditches and reservoirs used in connection "with such water rights as may have been acquired under or recognized by [Section 9 of the 1866 Act]."

Petitioner argues further that the court of appeals decision renders Sections 9 and 17 of the 1866 and 1870 Acts, respectively, "superfluous" and therefore "offends the well-settled rule of statutory construction that all parts of a statute, if at all possible, are to be given effect" (Pet. Br., p. 24) (citations omitted). This criticism is both unduly harsh and misdirected. The

court of appeals decision does indeed permit "all parts" of the mining law provisions "to be given effect." It permits *all* valuable minerals not specifically excepted to be located and it gives effect to Congress' explicit recognition of those rights to use water which were *vested* at the passage of the 1866 and 1870 Acts in accordance with state laws. It is petitioner who insists on ignoring the rule of statutory construction he invokes because he would attribute no meaning whatsoever to the critical language in *both* Sections 9 and 17—that the water rights described are those which *"have vested"* and *"have been acquired"* pursuant to state laws.[1]

---

[1] A lucid explanation of the reasons for congressional concern that vested rights be protected upon passage of the mining laws is contained in *Broder* v. *Natoma Water & Mining Co.*, 101 U.S. 274 (1879), where this Court said:

> We are of the opinion that it is the established doctrine of this court that rights of miners who had taken possession of mines and worked and developed them, and the rights of persons who had constructed canals and ditches to be used in mining operations and for purposes of agricultural irrigation, in the region where such artificial use of the water was an absolute necessity, are rights which the government had, by its conduct recognized and encouraged and was bound to protect before passage of the Act of 1866, and that the section of the Act which we have quoted was rather a voluntary recognition of a pre-existing right of possession, constituting a valid claim to its continued use, than the establishment of a new one.

Id. at 276. Dean Trelease, a noted contemporary authority on water law, also reads the water provisions in the mining law as merely a recognition of vested rights:

> Only in the negative sense that the United States promised to protect the water rights from claims of future patentees can this be said to be a water law. The criticism of the language as "unhappy" is justified only when it is sought to find something else in the act—a confirmation of state title to federal water, or permission for the states to dispose of federal water. Language for these provisions is not there and the existing language has to be stretched. But if the statute is read for what it was, it is very plain and clear.

F. TRELEASE, FEDERAL-STATE RELATIONS IN WATER LAW, National Water Commission Legal Study No. 5, p. 147c (1971) (hereinafter "TRELEASE").

It is also worth noting that nowhere in the legislative history of the mining laws is there any discussion which indicates that Congress intended anything so fundamental as to relinquish to the states the right to control water.

A close reading of the statutory language using "mineral" does not allow even an inference that Congress intended that term to exclude water.

The mining law of 1872, Act of May 10, 1872, ch. 152, 17 Stat. 91 (codified as amended in scattered sections of 30 U.S.C.), declares:

> Except as otherwise provided, *all valuable mineral deposits* in lands belonging to the United States . . . shall be free and open to exploration and purchase. and the lands on which they are found to occupation and purchase . . . ."

30 U.S.C. § 22 (1970) (emphasis supplied). This language is exceedingly broad and inclusive. It has been limited by three explicit exceptions, none of which excludes water as a locatable mineral.

The first limitation on the broad scope of mineral location under the mining law of 1872 is this Court's decision that the law applies only to mineral deposits in the "public domain" and not to other federal lands reserved for other purposes. *Oklahoma* v. *Texas,* 258 U.S. 574 (1922). This limitation has no relevance to the question whether water is a locatable mineral under the mining law.

A further limitation is that subsequent legislation has removed certain kinds of minerals, mineral deposits and the land containing them from the operation of the general mining law. For example, coal, oil, gas, oil shale, sodium phosphate and potash are excepted from the operation of the mining law and permission to extract them is acquired under a number of mineral leasing laws. 30 U.S.C. §§ 181-194, 201-209, 211-214, 223-229a, 241, 251 and 261-263 (1970). Sand, gravel and other specified common minerals once locatable under the mining law of 1872 were specifically withdrawn from location by Congress in 1955. Act of July 23, 1955, ch. 375, 69 Stat. 367 (codified at 30 U.S.C. §§ 601, 602, 611--615 (1970)). Congress has never acted to remove water from location as a mineral under the mining law.

The only limitation on the scope of the mining law relevant to this case lies in the definition of the phrase "valuable mineral deposits" used in section 1 of the 1872 law itself. The accepted test for determining whether public lands contain a "*valuable* mineral deposit" justifying location under the mining law is the "prudent man test." In *Cameron* v. *United States,* 252 U.S. 450 (1970), this Court set forth the test in these words: "To support a mining location the discovery should be such as would justify a person of ordinary prudence in the further expenditure of his time and means in an effort to develop a paying mine." *Id.* at 459. *See also Best* v. *Humboldt Placer Mining Co.,* 371 U.S. 334 (1963); *Chrisman* v. *Miller,* 197 U.S. 313 (1905); *Castle* v. *Womble,* 19 L.D. 455 (1894). In conjunction with the "prudent man" test, the "marketability" test was developed, as described by the Court in *United States* v. *Coleman,* 390 U.S. 599 (1968):

> . . . the marketability test is an admirable effort to identify with greater precision and objectivity

> the factors relevant to a determination that a mineral deposit is "valuable." It is a logical complement to the "prudent-man test" which the Secretary has been using to interpret the mining laws since 1894.

Id. at 602.

If the prudent man and marketability tests are applied to the water resources at issue in the present case, then the lands unquestionably contain a "*valuable* mineral deposit." As the court of appeals found:

> . . . the only relevant evidence in the record demonstrates the existence of a profitable market of water as a washing agent for the sand and gravel recovered from the valid claims. Although unwashed sand and gravel has a limited market, good quality sand and gravel in combination with water draws a premium market.
>
> We are satisfied that Charlestone has shown a profitable market for the water recovered upon claim 22 and its claim for the extraction of that water is valid.

(Pet. App. A., p. 17a).

There remains only the question whether water is a "mineral" deposit. Judicial authority on the subject is sparse. At least one federal court has looked to the standard developed by Lindley, one of the pre-eminent mining authorities, for guidance in determining whether a particular substance satisfies the definition of "valuable mineral deposit" locatable under the mining law of 1872:

> "The mineral character of the land is established when it is shown to have upon it or within it such a substance as: (a) Is recognized as a mineral, according to its chemical composition, by

> the standard authorities on the subject, or (b) Is classified as a mineral product in trade or commerce, or [sic] (c) Such a substance (other than mere surface which may be used for agricultural purposes) as possesses economic value for use in trade, manufacture, the sciences, or in the mechanical or ornamental arts, * * * and it is demonstrated * * * that such substance exists in the lands in such quantity as would justify a prudent man in expending labor and capital in the effort to obtain it." 1 Lindley Mines, 3rd ed. 1914. 174-175, § 98, as restated in 1 Amer. Law of Mining 172 § 2.4.

United States v. *Toole,* 224 F.Supp. 440, 445 (D. Mont. 1963). Although part (c) of this definition merely restates the prudent man test, part (a) is the test of "minerality" and looks to "standard authorities" on the subject.

Another source for a definition of the word "mineral" as used in the mining law is the petitioner's own regulations, which provide in relevant part:

> Whatever is recognized as a mineral by the standard authorities, whether metallic or other substance, when found in public lands in quantity and quality sufficient to render the lands valuable on account thereof, is treated as coming within the purview of the Mining Laws . . . .

Minerals Subject to Location, 43 C.F.R. § 3812.1 (1976). This definition also looks to "standard authorities" to determine whether water falls within the definition of the term "mineral" as used in the mining law.

Petitioner has ignored his own test to define the term "mineral" and has produced no standard authorities other than his own decisions to support his contention that water is not a "mineral." The court of appeals

did supply its version of standard authorities. It cited a mining law section of a recognized legal encyclopedia, 58 C.J.S. *Mines & Minerals* § 2(7) (1948), and a recent court of appeals decision, *United States* v. *Union Oil Co.,* 549 F.2d 1271 (9th Cir.), *cert. denied sub nom. Ottoboni* v. *United States,* 98 S.Ct. 418 (1977), *motion for leave to file petition for rehearing denied,* 46 U.S. L.W. 3542 (U.S. Feb. 28, 1978) (Pet. App. A, p. 16a).

The *Union Oil* decision is persuasive support for the decision below that water is a mineral. The question in that case was whether the mineral reservation in patents issued under the Stock-Raising Homestead Act of 1916, 43 U.S.C. §§ 291-301 (1970), reserved to the United States geothermal resources under the patented lands. That act contains a provision that all patents are "subject to and contain a *reservation* to the United States of all the coal and *other minerals* in the lands so entered and patented, *together with the right to prospect for, mine, and remove the same.*" 43 U.S.C. § 299 (1970) (emphasis supplied). The statutory language leaves no doubt that Congress reserved those minerals for mining under other appropriate federal acts—the general mining laws. The Ninth Circuit held in *Union Oil, supra,* that the clause reserving "all the coal and other minerals" included geothermal resources which include water. In its discussion the court stated, "[a]ll of the elements of a geothermal system—magma, porous rock strata, *even water itself*—may be classified as 'minerals.'" 549 F.2d at 1273-1274 (emphasis supplied). The reservation included clear language that the right to *mine* embraces all reserved minerals. That language necessarily applies to water. The court below correctly found this to be convincing authority for the proposition that water is a mineral under the mining law.

II. NEITHER THE MINING ACTS OF 1866 AND 1870, NOR THE DESERT LAND ACT OF 1877 RELINQUISHED CONTROL OF FEDERALLY OWNED WATERS BY VIRTUE OF RECOGNIZING VESTED RIGHTS UNDER STATE LAW.

The mining laws of 1866, Act of July 26, 1866, ch. 262, 14 Stat. 251, and 1870, Act of July 9, 1870, ch. 235, 16 Stat. 217, sanctioned and validated *vested* water rights recognized by local law and custom. These laws also guaranteed that appropriative rights acquired before 1866 would not be defeated by claims of federal mining patentees. But neither Act extended to a blanket disposition of the right to control federally owned non-navigable water to the states, as petitioner would have the Court believe. Nor did the Desert Land Act of 1877, ch. 107, 19 Stat. 377 (current version at 43 U.S.C. §§ 321-323, 325, 327-329 (1970)), convey title to these waters to the states. Since none of the above Acts specifically disposed of any federally owned waters, the most that can be attributed to them is that the United States agreed to *share,* not totally relinquish, control over non-navigable waters.

The critical premise of petitioner's argument is that the water provisions in the mining laws were not just a recognition of previously vested rights but a grant of authority to the states. The primary authority upon which petitioner relies in support of his thesis is *California Oregon Power Co.* v. *Beaver Portland Cement Co.,* 295 U.S. 142 (1935) (Pet. Br., pp. 17, 22). That case did not involve any claims to either land or water under the mining law. Neither the federal government nor any state participated in the litigation. The controversy involved only a dispute between private parties over use of water of a non-navigable stream which formed the boundary between the parties' lands. One of the landowners, the successor in interest to a patent issued pursuant to the Homestead Act of 1862, claimed the patent carried with it the common law right to continuous flow of the stream without substantial diminution. The other owner contended that the Oregon Water Code, which enacted the appropriation doctrine, governed the dispute. The Oregon Water Code had been adopted after acquisition of the homestead patent, but before the patentee's appropriation of the stream's water to beneficial use. The lower court held in favor of the party claiming appropriative rights under the Oregon Water Code. The Supreme Court affirmed, but—to borrow a phrase from petitioner's description of the court of appeals' affirmance in this case—with "significant addition[s]" (Pet. Br., p. 9).

The precise question before the Court was whether "the homestead patent in question carried with it as part of the granted estate the common law rights which attach to riparian proprietorship." 295 U.S. at 154. As noted, the "homestead patent in question" derived from the Homestead Act of 1862. To answer the specific question raised, the Court's opinion ranged broadly, offering its views of the effect of Section 9 of the mining law of 1866, of Section 17 of the 1870 amendments to the 1866 Act and, finally, construing the Desert Land Act of 1877, upon which it based its decision.

Petitioner asserts that this Court "held" in *Beaver Portland Cement* that the provisions of Section 9 of the 1866 and Section 17 of the 1870 mining laws apply prospectively, and argues that the case supports his position that the general mining law provides for

the acquisition of water rights exclusively by state and local law. Petitioner sets forth the following quotation from the Court's discussion:

> The effect of these acts is not limited to rights acquired before 1866. They reach into the future as well, and approve and confirm the policy of appropriation for a beneficial use, as recognized by local rules and customs, and the legislation and judicial decisions of the arid-land states, as the test and measure of private rights in and to the non-navigable waters on the public domain. 295 U.S. at 155.

(Pet. Br., p. 17).

That language is dictum—not a holding of the Court, as petitioner represents. Neither party in *Beaver Portland Cement* was making any claim to water rights on the basis of either Section 9 of the 1866 or Section 17 of the 1870 mining laws. Petitioner based its claim on the Homestead Act of 1862 and respondent based its claim on the Oregon Water Code of 1909. 295 U.S. at 151-153. Therefore, the Court's statement concerning "the effect of" the mining law provisions and the assertion that "[t]hey reach into the future" is not a holding, it is merely an observation.

Moreover, to the extent that the *Beaver Portland Cement* Court's statement may be regarded as appliable to the issue before this Court, it is perfectly consistent with respondent's position. It should be clearly understood that respondent does *not* contend that *only* those water rights appropriated for beneficial use under state law prior to 1866 or 1870 are "maintained and protected" under Section 9 or "recognized" under Section 17. On the contrary, we concede that under

both sections rights to appropriate beneficial use of water under state law may *vest*—and therefore be "protected" and "recognized"—at *any* time prior to such water being located as a mineral under the mining law of 1872. Petitioner, on the other hand, seeks to avoid the plain import of the harmonious reading of Section 9 of the 1866 Act, Section 17 of the 1870 Act and Section 1 of the 1872 Act by reading far more into the quoted *Beaver Portland Cement* language than is there—a recognition that water rights obtained under state appropriation laws *after* 1866 were nonetheless to be "recognized" and "protected."

Indeed, if as petitioner contends, the quoted *Beaver Portland Cement* language constitutes a "holding" that "when Congress enacted the general mining laws it chose to sanction the rights acquired under state and local law" (Pet.Br., p. 17), there would have been no need for the Court to analyze and interpret the provisions of the Desert Land Act of 1877. Since the successful respondent in *Beaver Portland Cement* was claiming superior water rights pursuant to state law, if the quoted language relied upon by petitioner were adequate to "sanction" that claim, the provisions of the Desert Land Act upon which the Court based its decision would have been irrelevant and unnecessary to the Court's decision.

Petitioner's reliance on *Beaver Portland Cement* does not end with that Court's dictum concerning the vested water rights provisions of the mining laws. To support his argument that "other public land laws followed the pattern established in the general mining laws, recognizing that state law governs the acquisition of private water rights on public lands"

(Pet. Br., p. 20) (footnote omitted) petitioner relies *exclusively* upon *Beaver Portland Cement*. Thus, petitioner extensively quotes the Court's construction of the Desert Land Act of 1877, and describes it as "[p]erhaps the most pertinent" of the "other public land laws" said to follow the "pattern" petitioner perceives in the general mining laws governing the acquisition of private water rights (Pet. Br., pp. 21, 22). But not even petitioner argues that *Beaver Portland Cement's* construction of the Desert Land Act embraced the general mining laws, much less Section 1 of the mining law of 1872, which is the statute at issue in *this* case and which is nowhere mentioned in the Court's expansive opinion.

Nor could such an argument, if advanced, withstand analysis. The Court was ruling upon conflicting claims to water, one pursuant to the Homestead Act of 1862, the other under a state water code enacted after issuance of the homestead patent, but before appropriation of any water from a non-navigable stream which formed one of the boundaries to the patented land. In those circumstances, there was no need for the Court to construe the mining laws generally, much less the specific provision of the 1872 mining law that is at issue here. Indeed, one wonders whether the Court's expansive construction of section 1 of the Desert Land Act was warranted since the rather explicit language in that section, including its water provision, nowhere mentions previously enacted preemption and homestead laws.[9] But at least the Court's

[9] The water provision provides:

> . . . provided, however, that the right to the use of water by the person so conducting the same on or to any tract of desert land of 640 acres shall depend upon bona fide prior appropriation; and such right shall not exceed the amount of water actually appropriated and necessarily used for the purpose of irrigation and reclamation; and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining, and manufacturing purposes, subject to existing rights."

43 U.S.C. § 321 (1970).

A careful reading of this provision shows its purpose was to limit the settlers' appropriation of water—not to grant power to the states. In analyzing this provision Trelease concluded:

> In context the proviso is a single proviso, a limitation on the settler. *He* had to appropriate, *He* could take only necessary water, and the rest of the water was reserved from him. It was a simple anti-monopoly provision. It deals with water law only in a most restricted sense, only in requiring the settler to acquire his water by appropriation and in preventing him from claiming more than he needs, even if the state law would allow him to do so. The legislative history bears this out.

TRELEASE at 147. The legislative history does indeed support this view. Debate in the Senate focused on the need for the bill because of the inadequacy of the homestead laws when irrigation was necessary. One Senator, fearing that under the act settlers could capture so much water as "to cut off others from tapping the lakes or tapping the streams and rivers," offered an amendment limiting the amount a settler could appropriate to the amount actually necessary for irrigation. 5 CONG. REC. 1964 (1877). This amendment, as refined by the conference committee, became the present water provision. It is reasonable to assume that the final proviso was merely a rewording and clarification of the Senator's thoughts and was meant to accomplish the same goal as the original amendment, and no more.

broad construction of the Desert Land Act can be explained by its desire to affirm the decree of the court below while "passing without consideration the second question discussed by that court upon which its decision rested, as to which we express no opinion." 295 U.S. at 165. That "second question" was whether, as

the court below had held, federal homestead patent water rights were "subject to the police power of the state and might be modified by legislation passed in the interest of the general welfare." 295 U.S. at 153. Had the *Beaver Portland Cement* Court accepted the narrower construction of the Desert Land Act—and thereby limited its application to desert land entries, as the Supreme Courts of California and Washington had done—the Court would have been forced to resolve whether states could regulate federal grants since the patentee was not claiming water rights pursuant to a Desert Land Act entry. The broad construction adopted by the Court permitted it to say, in language which precedes that quoted at length by petitioner (Pet. Br., p. 22):

> Congress must have known that innumerable instances would arise where lands thereafter patented under the Desert Land Act and other lands patented under the *pre-emption and homestead laws,* would be in the same locality and would require water from the same natural sources of supply. In that view, it is inconceivable that Congress intended to abrogate the common-law right of the riparian patentee for the benefit of the desert land owner and keep it alive against the *homestead or pre-emption claimant.*

295 U.S. at 161-162 (emphasis supplied).

Since the Court faced no such problem concerning *mining law* entries, claims and patents, it is not at all surprising that it was careful to expand the reach of the Desert Land Act only so far as to encompass homestead and pre-emption claimants and not mining law claimants.

Even assuming *arguendo* that the water law provisions in the mining law are read prospectively, this

does not mean they are exclusive. If petitioner's authority supporting a prospective reading of those water provisions is questionable, his support for the proposition that those provisions give the states *exclusive* control of water rights is non-existent. Petitioner's argument assumes that if the federal government chooses to recognize water claims vested under state law, even in the future, then the states have received an *exclusive* mandate to control water rights. That assumption is illogical and nowhere to be found either in statutory language or in case authority. Water rights may be acquired under either federal mining law or state law and a claim perfected under either must be respected and recognized by future claimants under both systems.

III. ACTIONS BY THE UNITED STATES GOVERNMENT AND DECISIONS OF THIS COURT HAVE LIMITED THE STATES' CONTROL OF WATER WHICH PETITIONER CLAIMS IS ABSOLUTE.

As the United States expanded westward and southward from the original thirteen states, the federal government became the owner of vast areas of land. In the states carved out of these lands, "[a]s the owner of the public domain, the government possessed the power to dispose of land and water thereon together, or to dispose of them separately." *California Oregon Power Co.* v. *Beaver Portland Cement Co.,* 295 U.S. 142, 162 (1935). Congress has inserted water provisions similar to those in the 1866 and 1870 mining acts in a number of statutes affecting land or water rights.[8]

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[8] One commentator identified the source of these provisions:

> Again and again the western states' delegations to Congress secured the insertion in laws for federal programs and projects

Petitioner asserts that these statutes are not only public land laws, such as the Desert Land Act, but include, "in addition many Acts dealing with federal programs and projects which include provisions disclaiming any intent to affect or or interfere with state laws relating to the control, appropriation, use or distribution of water, or with vested rights acquired under those laws" (Pet. Br., p. 20, n. 15). And petitioner identifies, *inter alia,* the Federal Power Act and the Reclamation Act as two statutes where "[p]rovisions of this nature are found." *Id.*

Understandably, petitioner does not argue that either the federal government or this Court interprets these federal laws in the fashion he urges this Court to construe the vested water rights provisions of the mining laws. For this Court's construction of the water provisions of Section 9(b) of the Federal Power Act,[4] 16 U.S.C. § 802(b) (1970), and Section 8 of the

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of a disclaimer that: "nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any state or territory relating to the control, appropriation, use or distribution of water, or any vested right acquired thereunder."

TRELEASE at 79.

The following is a sample of water provisions found in federal statutes which contain similar language to that quoted above: the Mining Act of 1866, § 9, 30 U.S.C. § 51 (1970), and 1870, § 17, 30 U.S.C. § 52 (1970); the Desert Land Act of 1872, § 1, 43 U.S.C. § 321 (1970); the Taylor Grazing Act, § 3, 43 U.S.C. § 315b (1970); The Reclamation Act of 1902, § 8, 43 U.S.C. §§ 372, 383 (1970); Federal Power Act of 1920, § 9(b), 16 U.S.C. § 802 (b) (1970); the Boulder Canyon Project Acts, 43 U.S.C., §§ 617q, 618m (1970).

[4] Section 9 provides in relevant part:

Each applicant for a license under this chapter shall submit to the commission—

Reclamation Act,[5] 43 U.S.C. §§ 372, 383 (1970) for example, is at war with the interpretation petitioner insists upon for similar provisions in the mining law.[6]

(b) Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purposes of a license under this chapter.

16 U.S.C. § 802(b) (1970).

[5] Section 8:

"That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: Provided, that the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right."

Reclamation Act of 1902, § 8, ch. 1093, 320 Stat. 388 (codified at 43 U.S.C. §§ 372, 383 (1970).

[6] Petitioner cited in a footnote the following statutory language as his example of a typical water provision in a federal statute:

The National Forest Act provides (30 Stat. 36, 16 U.S.C. 481): "All waters within the boundaries of national forests may be used for domestic, mining, milling or irrigation purposes, under the laws of the State wherein such national forests are situated, or under the laws of the United States and the rules and regulations thereunder."

(Pet. Br., p. 21, n.16). Ironically this proviso on its face calls for both state and federal control of the use rights of that water on the public domain—which is precisely what petitioner claims is impossible under the water provisions in the mining law.

Both are standard provisions which under petitioner's argument do not permit the Acts of which they are a part to interfere with state law regarding control of water. Both received short shrift from the federal government and from this Court.

In *First Iowa Hydro-Elec. Cooperative* v. *Federal Power Commission,* 328 U.S. 152 (1946), the question was whether a diversion from a navigable stream could be licensed by the Federal Power Commission without a state permit. The resolution of that question turned on Section 9(b) of the Federal Power Act. The Court found that state water law was inconsistent with provisions of the Federal Power Act, and held that Section 9(b) was not intended to permit duplication of regulatory control. The federal statute was held to be paramount, and to supersede state law. The Court's construction of Section 9(b) was that the applicant need only submit evidence that he took steps to secure state approval. The decision in *First Iowa* makes untenable petitioner's argument that the states have been given exclusive control of water rights. That decision is consistent with respondent's argument—that the federal government has control of water rights and has also chosen to recognize rights vested under state law. Recognition of water rights vested under state law is not inconsistent with the recognition of additional methods of acquiring water rights under the federal mining laws.

"State control" of water under Section 8 of the Reclamation Act met the same fate as it did under Section 9(b) of the Federal Power Act through a series of three decisions by this Court. *Ivanhoe Irrigation Dist.* v. *McCracken,* 357 U.S. 275 (1958), upheld a Reclamation Act provision which limited the amount

of water that could be appropriated for use by one landowner. The California Supreme Court had held that Section 8 required the application of state water law. This Court reversed. Although the Court disavowed that it was "passing generally on the coverage of Section 8 in the delicate area of federal-state relations in the irrigation field," *Id.* at 292, it nonetheless held that federal rather than state water law controlled the limits of water appropriation.

In *Fresno* v. *California,* 372 U.S. 627 (1963), the city sought an injunction and declaration that its water rights were superior to a federal reclamation project, or that it was entitled to participation in the project by reason of state laws giving it preference to the use of water for municipal purposes. Although the Court held that the United States and the reclamation officials were immune from suit, it stated that, "[s]ection 8 does not mean that state law may operate to prevent the United States from exercising the power of eminent domain to acquire the water rights of others . . . [r]ather, the effect of Section 8 in such a case is to leave to state law the definition of the property interests, if any, for which compensation must be made." 372 U.S. at 630. In a companion case, *Dugan* v. *Rank,* 372 U.S. 609 (1963), holders of water rights whose water was captured by the federal dam project were left with only a suit for damages as relief. These cases appear to attribute to Section 8 little more than the proposition that the United States will pay if the Secretary takes a citizen's water.

Only one construction of the so-called water provisions can be read consistently in every federal statute and yet do no violence to any statute: those provisions were intended only to protect water rights which had

vested under state law prior to statutorily sanctioned behavior which otherwise could threaten those water rights. Thus federal laws such as the mining law could dispose of water as long as each disposition in no way affected *vested* state water rights. The petitioner's argument that the single water provision in each of the two mining acts and the Desert Land Act somehow constitute a "federal water act" designed to legitimate the states' exclusive future control of water rights is more freight than the individual provisions can carry.

The extent of federal power to regulate water is seen in *Federal Power Commission* v. *Oregon*, 349 U.S. 435 (1955). This case again involved a conflict between the FPC and state licensing authorities, but differed from *First Iowa, supra*, in that the stream was non-navigable and the dam was to be built on federally reserved lands. The Court found that the FPC had jurisdiction over the project not, as in *First Iowa*, because navigable waters of the United States were involved, but because of "the ownership or control of the United States of the reserved lands on which the licensed project is to be located." 349 U.S. at 442. The license issued by the FPC had expressly subjected the project to all "existing rights to the use of the water of the river, whether perfected or not." 349 U.S. at 441. But when the State of Oregon objected, this Court upheld the Commission. By finding the constitutional authority of Congress in that case to lie in the property clause, the Court's rationale can only have been that the United States owns *some* property, *viz.*, unappropriated non-navigable waters, which it can therefore regulate free of state control. This conflicts with petitioner's reading of the water provisions of the mining law which petitioner claims give the states absolute control.

Undoubtedly the most significant limitation on states claiming title or even affecting control of waters is the "reservation doctrine." The doctrine originated in *Winters* v. *United States*, 207 U.S. 564 (1908) which held that the setting aside of an Indian reservation also necessarily reserved enough water to accomplish the purpose of the reservation. In *Winters*, private appropriative rights to the non-navigable Milk River were acquired and vested under state law subsequent to the date of the federal reservation. The Court held that those private rights were inferior to a later necessary water use by the reservation.

The reservation doctrine was expanded far beyond its original scope by *Arizona* v. *California*, 373 U.S. 546 (1963). Although *Winters* had focused upon the Indians' need for water, the Court in *Arizona* concluded that the principle underlying the reservation of water rights for Indian lands is equally applicable to other federal establishments. The Court found that the federal government impliedly reserves water everytime it creates a federal enclave. Thus the reservation doctrine also applies to national recreation areas, wildlife refuges and national forests. 373 U.S. at 601.

This Court's most recent expansion of the reservation doctrine came in *Cappaert* v. *United States*, 426 U.S. 128 (1976), which extended it to percolating water. The pumping of a private water user adjacent to a federal reservation was lowering the water level on the reservation and threatening the endangered species of fish for which the reservation had been made. The water rights of the private user had apparently been perfected under state law after the federal reservation had been created. Since the federal reservation was prior in time to the citizen's appropriation, the

Court held that the citizen's rights had not vested and were therefore inferior to the reserved needs of the federal reservation.

The most significant impact of the reservation doctrine is that anyone in or around federal reservations who appropriates water subsequent to the establishment of the reservation can never be certain that his rights—even if perfected under state law—are inviolate. If, in the future, any appropriation adversely affects the amount of water necessary for the purpose of the reservation, a court seeking to satisfy the needs of the reservation could declare the rights of the private appropriator never to have vested. The system of rights that petitioner has himself supported and enforced elsewhere is inimical to the interpretation of the water provisions of the mining law he urges here. Petitioner here insists that Congress has turned over to the states the sole authority to control the acquisition of water rights under the mining law and that this control cannot be shared with the federal government without throwing established rights into doubt. Petitioner so argues despite his support elsewhere of the reservation doctrine in which unquantified federally reserved water rights are forever superior to the "established" rights of later appropriators under state law.

IV. DEPARTMENT OF INTERIOR CONSTRUCTION OF THE MINING LAW OF 1872 IS NOT BINDING ON THIS COURT.

Petitioner argues that the "long-standing" Department of Interior interpretation that water is not a locatable mineral under the mining law is "well nigh conclusive" before this Court (Pet. Br., p. 31). On the contrary, this Court is not so bound by Department of Interior decisions. In *County of Marin* v. *United*

States, 356 U.S. 412 (1958), the Court stated, "[w]hile the interpretation given a statute by those charged with its application and enforcement is entitled to considerable weight, it is hardly conclusive." *Id.* at 420.

Because petitioner is charged with administering land laws he claims that under *Udall* v. *Tallman,* 380 U.S. 1 (1965), his interpretation is entitled to "great deference." Again citing *Udall* petitioner asserts, "[t]his deference is especially appropriate where the administrative practice at stake 'involves a *contemporaneous construction* of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new'" (Pet. Br., pp. 30-31) (emphasis supplied). *Pagosa Springs,* 1 L.D. 573 (1882) and *William A. Chessman,* 2 L.D. 774 (1883) are the earliest Department of Interior decisions cited by petitioner. Decisions handed down sixteen years after the 1866 Mining Act and twelve years after the 1870 Act can hardly be called "contemporaneous." In addition, neither of those decisions is more than a few conclusory sentences nor did they offer any rationale or authority for their conclusion that water is not a locatable mineral. Yet subsequent Interior decisions rely heavily on these two cases in holding water not locatable under mining law. *See Robert L. Beery,* 25 IBLA 287 (1976) *appeal pending sub nom. Steele* v. *Kleppe,* No. C-76-1840-WHO (N.D. Cal., filed Aug. 26, 1976).

Even "more than a century" of administrative decisions cannot by weight of number or length of time develop statutory interpretation which is immune to a different interpretation by this Court. This is espe-

cially true when the foundation for the line of decisions is as fragile as in the instant case.[7]

V. PETITIONER'S ASSERTION THAT LOCATING WATER UNDER THE MINING LAW MAY LEAD TO ABUSE IS MERE CONJECTURE AND IN ANY EVENT PROPERLY A CONCERN OF CONGRESS AND NOT THIS COURT.

Petitioner's final argument is that if this Court concludes that water is a locatable mineral widespread abuse of the mining laws will inevitably result. This argument is made in significant part by juxtaposing an estimate of the total amount of water available with a schedule of the relatively low fees assessed by the federal government for location and perfection of a claim. The resulting impression that western water resources would be easily susceptible to cheap abuse fails to account for the expense and effort required to locate the water, which is largely underground, and the significant role of the "prudent man" and "marketability" tests in perfecting a claim.

The other aspect of petitioner's argument, that other minerals have been "abused," contains the seeds of its own destruction. Even assuming *arguendo* that some claimants abused claims based on water, those abuses should be remedied neither in this Court nor in advance of proof. Petitioner has cited no authority to support his contention that this Court should not permit the location of water as a mineral because of possible

[7] As Mr. Justice Holmes once lamented:

> It is one of the misfortunes of the law that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis.

Hyde v. *United States*, 225 U.S. 347, 391 (1911) (dissenting opinion).

abuse. Congress enacted the mining law in its present form and if that law as written is being abused it would be the responsibility of Congress to amend that law. As petitioner himself points out, Congress acted to remove sand, gravel and other specified minerals of widespread occurrence from location under the mining law (Pet. Br., p. 33). Congress has not removed water from the operation of the mining law. Petitioner nonetheless concludes that this Court must not permit the location of water. For this Court to hold water not locatable under the mining law with no supporting statutory language or congressional intent, in advance of any actual abuse of the law, and in an area where Congress has shown it will act if necessary, is untimely and an act in substance if not in form more legislative than judicial.[8]

[8] Petitioner argues that "If location under mining laws were now deemed the exclusive method for acquiring water rights (despite 30 U.S.C. 51 and 52), private rights long established under state law would presumably be invalidated." (Pet. Br., p. 32). This argument can be put to one side. Respondent urges only that location of water under the mining laws is merely an alternative method of acquiring water rights in addition to state law. Water rights which vest under state law must continue to be respected by a mining claimant by virtue of the water provisions of the 1866 and 1870 mining acts.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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